

REMARKS

This Amendment is submitted in reply to the Non-Final Office Action mailed on November 4, 2009. A Petition for a one month extension of time is submitted herewith this Amendment. The Director is authorized to charge \$130.00 for the Petition for a one month extension of time and any additional fees that may be required, or to credit any overpayment to Deposit Account No. 02-1818. If such a withdrawal is made, please indicate the Attorney Docket No. 3712036-00754 on the account statement.

Claims 24-44 are pending in this application. Claims 1-23 were previously canceled without prejudice or disclaimer, and Claims 31-43 were previously withdrawn from consideration. In the Office Action, Claims 24 and 44 are rejected under 35 U.S.C. §112. Claims 24-30 and 44 are rejected to under 35 U.S.C. §103. In response, Applicants have amended Claims 24, 26 and 44, have canceled Claim 25 without prejudice or disclaimer. The amendments do not add new matter and are supported in the specification at, for example, page 1, line 12-page 2, line 16; page 2, lines 18-37; page 3, line 30-page 4, line 24. In view of the amendments and/or for at least the reasons set forth below, Applicants respectfully submit that the rejections should be reconsidered and withdrawn.

In the Office Action, Claims 24 and 44 are rejected under 35 U.S.C. §112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. Specifically, the Patent Office asserts that the phrase “excess quantity compared with that which would be strictly necessary to establish a continuous layer over the inner wall of the wafer” of Claims 24 and 44 is a relative phrase which renders the claims indefinite. See, Office Action, page 2, lines 13-19. In response, Applicants have amended Claims 24 and 44 for clarification purposes to delete the recitation of “compared with that which would be strictly necessary to establish a continuous layer over the inner wall of the wafer.” Applicants also respectfully disagree with the Patent Office’s assertion that the meaning of the phrase “excess quantity” would not be reasonably ascertained by the skilled artisan.

The standard for determining whether the definitiveness requirement is met under 35 U.S.C. § 112, ¶ 2 is “whether those skilled in the art would understand what is claimed when the claim is read in light of the Specification.” *Orthokinetics Inc. v. Safety Travel Chairs Inc*, 1

U.S.P.Q. 2d 1081-1088 (Fed. Cir. 1986). “If the claims, read in light of the Specification, reasonably apprise those skilled in the art both of the utilization and scope of the invention, and if the language is as precise as the subject matter permits, the Courts can demand no more.” *North American Vaccine Inc. v American Cyanamid Co.*, 28 U.S.P.Q. 2d 1333, 1339 (Fed. Cir. 1993). In this regard, “[p]atent law allows the inventor to be his own lexicographer … [T]he specification aids in ascertaining the scope and meaning of the language employed in the claims inasmuch as words must be used in the same way in both the claims and the specification. *United States v. Teletronics, Inc.*, 8 U.S.P.Q. 2d 1217, 1220 (Fed. Cir. 1988). By statute, 35 U.S.C. 112, Congress has placed no limitations on how an applicant claims his invention, so long as the specification concludes with claims which particularly point out and distinctly claim that invention.” *In re Pilkington*, 162 U.S.P.Q. 145, 148 (C.C.P.A. 1996). Applicants respectfully submit that the skilled artisan would immediately appreciate the meaning of the phrase “excess coating” when the claims are read in view of the specification.

For example, the specification discusses at length the disadvantages that occur with prior art methods of ice cream packaging. Specifically, if a coating agent does not completely coat the inside of a wafer, the wafer loses its crunchy nature when exposed to the moisture of the ice cream that is inserted into the container. Additionally, when a coating such as chocolate is sprayed into a container such as a wafer, it typically results in a highly excess quantity of chocolate being used compared with that which would be just necessary to produce a continuous, uniform layer on the inner wall of the wafer. When this occurs, and the excess coating material collects at the bottom of the wafer, there is less room to fill the wafer with ice cream and the cost of making the product is significantly increased. See, specification, page 1, line 12-page 2, line 16.

The specification goes on to discuss how the above-mentioned disadvantages may be remedied by the presently claimed processes. For example, to avoid the loss of the crunchy nature of the wafer, the inner wall of the wafer may be sprayed with a fluid coating agent in an excess quantity compared with that which would be strictly necessary to establish a continuous layer over the inner wall of the wafer such that an excess of coating agent flows to the bottom of the cone. In a subsequent step, the excess coating agent is sucked out and the excess is recovered

and then recycled with a view to the spraying of another wafer. See, specification, page 2, lines 18-37.

With respect to the amounts of “excess coating,” Applicants respectfully submit that the coating must be provided in an amount that continuously coats the walls of the container and also causes pooling of the coating at the bottom of the container, as is discussed at length in the specification. Further, an example is provided in the specification wherein a sufficient amount of hot chocolate is sprayed onto the inner wall of the wafer to guarantee that no gap remains in the coating of said inner wall. Specifically, the example states that “[i]n order to guarantee the absence of such gaps, the quantity of chocolate sprayed must be an excess: for example, 12 g of chocolate will be sprayed into a cornet although the coating layer remaining on the wall of the wafer is approximately 6 grams. The remaining 6 grams collect in the bottom part of the cornet, as may be seen clearly in FIGS. 2 and 3.” See, specification, page 9, line 36-page 10, line 18. Accordingly, the skilled artisan would immediately appreciate the amounts of “excess coating” that would be required by the presently claimed processes.

Further, as mentioned above, Figures 2 and 3 clearly illustrate steps in the claimed processes for filling the containers with a coating material using a spray station, allowing excess liquid coating to collect at the bottom of the container, and then using the suction station to remove the excess liquid coating. Additionally, the difference between the amounts of coating in fully illustrated containers 3 and 4 in Figure 3 would be readily apparent to the skilled artisan. Accordingly, the skilled artisan would immediately understand what is meant by the phrase “excess coating” when read in view of the specification. For at least the reasons set forth above, Applicants submit that Claims 24 and 44 fully comply with the requirements under 35 U.S.C. §112, second paragraph.

Accordingly, Applicants respectfully request that the rejection of Claims 24 and 44 under §112, second paragraph, be reconsidered and withdrawn.

In the Office Action, Claims 24-30 and 44 are rejected under 35 U.S.C. §103(a) as being unpatentable over U.S. Patent No. 3,171,367 to Carter et al. (“*Carter*”) in view of U.S. Patent No. 2,670,696 to Covert et al. (“*Covert*”) and further in view of U.S. Patent No. 3,552,212 to Ohlin (“*Ohlin*”). For at least the reasons set forth below, Applicants respectfully submit that,

even if combinable, the cited references fail to disclose each and every element of independent Claims 24 and 44 and Claims 25-30 that depend therefrom.

Independent Claims 24 and 44 recite, in part, processes comprising spraying an inner wall of a container with a liquid coating agent, the inside of the container being sprayed with an excess quantity of coating agent, the excess quantity being sufficient to prevent a coating-gap zone on the inner wall of the wafer that is to come into contact with the food product; allowing excess liquid coating agent to collect, under gravity, at the bottom tip of the container; removing the excess liquid coating agent, recycling the excess coating agent to a supply for spraying the inside of the container, the excess coating agent being removed via a pipette, an end of the pipette including at least one suction orifice, and after suction, supplying the orifice with a gaseous flow in order to expel any possible clogging particles that might remain therein, wherein the gaseous flow is blown through the suction orifice so that the flow ejects the particles in a direction that is the same as a passage direction of the flow of recycled coating agent.

As discussed above, it is imperative in manufacturing ice-cream filled cornet wafers to maintain the desirable crunchy nature of the wafer by protecting the wafer from contacting the ice cream. See, specification, page 1, line 12-page 2, line 16. Conventional methods of addressing this problem have simply sprayed an excess amount of chocolate coating agent on the inner wall of the wafer to form a barrier between the wafer and the ice cream. See, specification, page 1, line 12-page 2, line 16. However, although the spraying of excess coating agent prevents a gap forming in the chocolate layer, it results in an excess quantity of chocolate accumulated at the bottom tip of the cone, thereby making the cone undesirable to consumers. See, specification, page 1, line 12-page 2, line 16.

The present claims provide a method in which the inside of the container is sprayed with an excess quantity of coating agent compared with that which would be strictly necessary to establish a continuous layer over the inner wall of the wafer, and prior to the solidification the excess liquid coating agent is removed via a pipette positioned close to the bottom tip of the container and is recycled for spraying another container. By removing the excess coating agent via a pipette and recycling the excess coating agent to a supply for spraying the inside of another container, the present claims reduce the cost associated with using excess coating agent and eliminate consumer dissatisfaction associated with excess coating agent in the bottom of the

cone. See, specification, page 2, lines 18-37. In contrast, Applicants respectfully submit that the cited references are deficient with respect to the present claims.

For example, even if combinable, the cited references fail to disclose or suggest wherein the gaseous flow is blown through the suction orifice so that the flow ejects the particles in a direction that is the same as a passage direction of the flow of recycled coating agent as required, in part, by independent Claims 24 and 44 from which Claims 25-30 depend. The Patent Office admits that both *Carter* and *Covert* fail to disclose “back flushing the nozzle” and instead relies on *Ohlin* for disclosure of expelling particles in the orifice using a gaseous flow. See, Office Action, page 5, lines 7-21.

However, *Ohlin* is entirely directed to a device for cleaning the outer surface of a take-off tube that uses suction (e.g., negative pressure) to flow around the take-off tube in a bore to remove any deposits on the outer surface. See, *Ohlin*, Abstract. Specifically, “[a] suction source . . . is connected to an intermediate enlarged portion 28 of the bore 26 through a conduit 29 and a passage 30 in the collar.” See, *Ohlin*, column 2, line 72-column 3, line 3. Further, “[w]hen the probe 18 is withdrawn from the sample tube 15 as shown in FIGS. 2 and 3, a film of wash-liquid is drawn from the recess 31 through the annular space 27 and around the probe portion 19 to the suction conduit 29, and simultaneously air is drawn through the lower end of the annular space as indicated by arose in FIG. 3.” See, *Ohlin*, column 3, lines 10-15 (emphasis added).

Accordingly, it is clear that the air flow of *Ohlin*, which is sucked through suction conduit 29 by negative pressure, is not in a direction that is the same as a passage direction of the flow of recycled agent as is required, in part, by the present claims. This is in direct contrast to the present claims that require, in part, a positive pressure gaseous flow to be blown through it so that the flow ejects the particles in a direction that is the same as a passage direction of the flow of recycled coating agent.

The cited references also fail to disclose the inside of the container being sprayed with an excess quantity of coating agent as recited, in part, by independent Claims 24 and 44. The Patent Office admits that *Carter* fails to disclose an excess quantity of coating agent and instead asserts that *Covert* discloses the use of excess chocolate. See, Office Action, page 5, lines 1-9 and 21-22. However, the portion of *Covert* relied on by the Patent Office merely discloses that molds have been “filled” with chocolate, not that they have been “sprayed” with an excess quantity of

chocolate. See, *Covert*, column 1, lines 41-47. When describing its suction removal of chocolate from molds, *Covert* states that “multiple cavity molds 7, which have been previously filled in a depositing machine, are carried by a conveyor 8 into position beneath suction nozzles 9.” See, *Covert*, column 1, lines 42-45. This difference is significant because if the entire ice cream cone were completely filled with liquid chocolate, rather than spraying the chocolate only on the inner wall of the cone, the ice cream cone would immediately soften and lose its crispiness. Nowhere does *Covert* disclose or even suggest that its molds are “sprayed” with an excess quantity of chocolate, nor does the Patent Office cite support for such claimed element. For at least the above-mentioned reasons, Applicants respectfully submit that the cited references fail to disclose or suggest each and every element of the present claims.

Furthermore, one of ordinary skill in the art would have no reason to combine *Carter* and *Covert* because they are directed to different problems in different fields of endeavor. *Carter* is entirely directed to spraying a chocolate coating on the interior of an ice cream cone immediately before the cone is filled with ice cream. See, *Carter*, column 1, lines 56-60; column 2, lines 5-7. *Carter* teaches that “saving of the chocolate coating material is effected because it is not necessary to provide a large quantity in accordance with the method of the present invention since sufficient time is not permitted for the absorption of an unnecessary and excessive amount of chocolate into the pores of the cones.” See, *Carter*, column 2, lines 17-22. Therefore, it is apparent that no excess chocolate is generated in the ice cream cone production process of *Carter* and *Carter* is completely unconcerned with the removal of excess chocolate in the bottom of its cone.

In contrast, *Covert* is entirely directed to suction removal of an excess quantity of chocolate in a mold during the manufacture of chocolate shells for filled candies. See, *Covert*, column 1, lines 1-13. *Covert* states that “it is a purpose of the invention to eliminate the need for inverting the molds to pour off excess chocolate and then to scrape the mold faces clear of spilled chocolate.” See, *Covert*, column 1, lines 6-9. Because *Covert* involves the manufacture of filled candy chocolate shells in molds, *Covert* is entirely unconcerned with the problems related to an excess quantity of chocolate in a consumable ice cream cone. As such, one of ordinary skill in the art would have no reason to combine the ice cream cone manufacturing process steps of *Carter* with the suction removal step of *Covert* to arrive at the present claims.

The Patent Office asserts that simply because *Carter* and *Covert* are both directed to “the preparation of chocolate containing comestibles for human consumption,” that *Carter* and *Covert* are both from the same field of endeavor. See, Office Action, page 9, lines 4-12. However, Applicants note that simply because the references are allegedly related to preparation of chocolate comestibles, the skilled artisan would appreciate that there are numerous methods that may be used for the preparation of chocolate containing comestibles in general, not to mention the numerous methods for the preparation of chocolate-containing ice cream products, and the numerous methods for the preparation of chocolate-containing candies. Indeed, the fields of endeavor here are too vast and too different to provide a reason to combine *Carter* and *Covert* to arrive at the present claims.

Additionally, *Ohlin* is entirely related to the cleaning of an exterior of an elongated body. See, *Ohlin*, Abstract. Accordingly, it is clear that *Ohlin* is not directed to the “preparation of chocolate containing comestibles for human consumption,” which the Patent Office alleges is the common thread to the cited references. For at least the above-mentioned reasons, Applicants respectfully submit that the skilled artisan would have no reason to combine the cited references to arrive at the present claims.

Accordingly, Applicants respectfully request that the rejection of Claims 24-30 and 44 under 35 U.S.C. §103(a) to *Carter*, *Covert* and *Ohlin* be withdrawn.

For the foregoing reasons, Applicants respectfully request reconsideration of the above-identified patent application and earnestly request an early allowance of the same. In the event there remains any impediment to allowance of the claims which could be clarified in a telephonic interview, the Examiner is respectfully requested to initiate such an interview with the undersigned.

Respectfully submitted,

K&L GATES LLP

BY

Robert M. Barrett
Reg. No. 30,142
Customer No. 29157
Phone No. 312-807-4204

Dated: February 19, 2010